



Case Number: 1305676/2020
1310887/2020
1300306/2021

EMPLOYMENT TRIBUNALS

Claimant
Ms A Dos Santos

BETWEEN
AND

Respondent
TJX UK

JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON A PRELIMINARY HEARING (RESERVED JUDGMENT)

HELD AT Birmingham ON 17 June 2021

EMPLOYMENT JUDGE GASKELL

Representation

For the Claimant: Mr I Pettifer (Solicitor)
For the Respondent: Mr S Proffitt (Counsel)

JUDGMENT

The Judgment of the tribunal is:

- 1 That, at no time material to these claims, was the claimant s disabled person as defined in the Equality Act 2010.
- 2 Accordingly, the claimant's claim for disability discrimination (harassment and a failure to make adjustments) is dismissed.
- 3 The claimant's claim for constructive unfair dismissal is unaffected by this decision. That claim remains listed for Final Hearing on **24 January 2022** with a time allocation of 5 days. The Hearing will now take place in Birmingham before an Employment Judge sitting without non-legal members.

REASONS

Introduction

1 The claimant in this case is Mrs Ana Rose Dos Santos who was employed by the respondent, TJX UK, as a warehouse operative, from 28 October 2018 until 27 November 2020 when she resigned. The claimant has presented three claims to the tribunal:

- (a) The first (Claim Number 1305676/2020), presented on 30 April 2020, is a claim for disability discrimination during the continuity of the claimant's employment. It provides details of events between August 2018 and

August 2019

- (b) The second (Claim Number 1310887/2020), presented on 1 December 2020, is a second claim for disability discrimination during the continuity of the claimant's employment. It provides details of events occurring between 1 July 2020 and 1 October 2020
- (c) The third (Claim Number 1300306/2021), presented on 27 January 2021, is a claim for unfair dismissal; disability discrimination; and unpaid notice pay. It deals with events occurring between 1 October 2020 and the claimant's resignation on 27 November 2021.

2 The three claims were consolidated by Order of Employment Judge Algazy QC on 28 January 2021. The Case Management Order of Judge Algazy refers to the claimant claiming to be a disabled person by reference to a caesarean scar which has not properly healed together with a back/shoulder injury. Judge Algazy makes no reference to the claimant suffering from anxiety.

3 On 8 October 2020, Employment Judge Meichen made an Order for the disclosure of medical evidence and an impact statement relating to disability and for the respondent to reply to such disclosure indicating whether disability was conceded or not. I assume that Judge Meichen's Orders were disregarded, as they were essentially repeated by Judge Algazy QC in his Case Management Order of 28 January 2021.

4 However, following disclosure in compliance with Judge Algazy QC's Order, it is apparent that the claimant relies on three conditions: namely, the caesarean scar; the back/shoulder injury; and anxiety. The strands of discrimination alleged are harassment relating to disability; and a failure to make adjustments. Essentially, it is this alleged ongoing conduct which is relied upon by the claimant as amounting to a fundamental breach of the employment contract - grounding her constructive dismissal claim.

5 The claims are resisted in their entirety: the respondent does not admit that any material time the claimant was a disabled person as defined in the Equality Act 2010 (EqA); it further denies having sufficient knowledge of any disability for such to have been the motivation for any of the alleged acts of harassment or for the duty to make adjustments to have been engaged; in any event, the respondent denies acts of harassment or any failure to make adjustments or any conduct amounting to a breach of the claimant's employment contract it is the respondent's case that some of the claims are presented out of time and the tribunal has no jurisdiction to consider them.

6 Judge Algazy QC listed the Final Hearing of the claims to take place over five days in January 2022 and he made appropriate Case Management Orders. Judge Algazy QC clearly envisaged that all preliminary issues such as disability;

knowledge; and jurisdiction would be considered at the Final Hearing. However, following disclosure of the medical evidence and the claimant's impact statement, by an email dated 12 March 2021, the respondent's solicitor informed the tribunal that disability remained in dispute and requested that this matter be resolved as a preliminary issue as an Open Preliminary Hearing (OPH). On 24 March 2021, Employment Judge Broughton approved that request and directed the listing of today's OPH. I am therefore considering only the question of whether or not, at any material time, the claimant was a disabled person as defined in EqA. I do so by reference to the three conditions: the caesarean scar; the back/shoulder injury; and anxiety.

The Evidence

7 The claimant relied on her impact statement, which is undated, and appears at pages 143 - 146 of today's bundle. The claimant gave oral evidence to confirm the statement; she was cross-examined; and I had the opportunity to ask questions.

8 I have the following medical evidence:

- (a) The claimant's GP notes and records for the period 1 January 2018 - 30 December 2020.
- (b) OH report: 11 September 2020
- (c) GP Fit Notes: 10 June 2019 Stress
25 June 2019 Stress
13 February 2020 Shoulder Pain

The Facts

9 The claims span the entire period of employment beginning in December 2018 until the claimant's resignation on 27 November 2020. However, the claims regarding the claimant's physical and mental health are distinct - the claimant's mental impairment has nothing to do with her physical ability to lift heavy items. Moreover, the period during which the claimant claims to have suffered from those impairments are distinct: the first reference to the claimant experiencing stress is June 2019.

10. Therefore, as well as treating those impairments distinctly for the purposes of the disability test itself, it is also important in this case to determine precisely at what point in time each impairment met that test (if at all). The first recorded reports of the alleged impairments in the medical records are as follows:

- (a) Caesarean Scar Pain – 3 June 2019
- (b) Shoulder pain (left) – 31 May 2019

- (c) Shoulder pain (right) – 13 Feb 2020
- (d) Back pain – 18 Feb 2020
- (e) Anxiety (work related stress) – 10 June 2019

Depending on my findings against each impairment and the material time(s), the claimant may be found to be disabled in relation to one or more impairments at different times.

11 The claimant has provided an impact statement which portrays an exceptionally physically and psychologically frail individual; a person substantially unable to move and use her hands and shoulders, unable to drive, comb her daughter's hair, go shopping, iron clothes, use a washing machine, or even take a cake out of the oven. If that description is accurate, then plainly the claimant a disabled person - and she is likely to have been such during the period of her employment.

12 The following facts emerge from detailed consideration of the GP Notes and Records:

Caesarean Scar

- (a) The GP confirms that the claimant had a Caesarean birth on 01 Jan 2018.
- (b) There is no entry at all regarding any complications or pain which could be related to her Caesarean until March 2019 (over a year after the birth).
- (c) On 25 Mar 2019 the GP notes "*slight lower [abdominal] tenderness*".
- (d) There is nothing to indicate the claimant's Caesarean is relevant to that "*slight*" lower abdominal pain. There is no medication/treatment advised or prescribed;
- (e) 15 May 2019: Lab Results for "*Ultrasound Abdomen*" record "*A Normal Result – No Action Needed – Reassure Patient*"
- (f) On 3 June 2019 the claimant attended her GP to receive her scan results. The claimant is recorded as describing "*when she carries heavy stuff she gets pain in the scar area; it is not a bad pain but annoying pain*" There is no medication/treatment advised or prescribed.
- (g) There is no entry at all regarding any abdominal pain between June 2019 and December 2019, and there is no ongoing treatment in relation to it.
- (h) On 6 Dec 2019 the claimant attended her GP regarding an unrelated gynaecological issue. The history notes "*feels as if she has pain around the c-section*" "*says pain first started about April this year, then went away now it has come back. Started again 2 or 3 weeks ago. Pain brought on when she lifts heavy objects. Describes pain as stretching. No pain when sitting*". No medication/treatment was advised or prescribed.
- (j) 9 Jan 2020: Lab Results for "*Ultrasound Pelvis Transvaginal*" record "*A Normal Result – No Action Needed – Reassure Patient*".

- (k) There are no further entries at all whatsoever regarding any abdominal pain for any reason after December 2019. The entirety of the claimant's physical complaints about moving and handling thereafter relate only to her shoulders, neck and back. There is no evidence anywhere of a link between the alleged abdominal pain, and the alleged shoulder/neck/back pain.

Back/Shoulder Pain

- (l) On 31 May 2019 the GP records "*acute onset and never happened before*" "*sharp pain which came on acutely w/out any triggers*" in left shoulder. Further, the claimant "*could not raise arm above deltoid*". The claimant was treated with Naproxen (a painkiller) and advised to rest/ice/exercise.
- (m) 18 July 2019: Lab Results for "*Ultrasound Left Shoulder*" record "*A Normal Result – No Action Needed – Reassure Patient*".
- (n) On 2 Aug 2019, the claimant attended her GP to receive the scan results, and records "*painful restricted [left] shoulder movement due to ? her repetitive movement at work*". The claimant was referred to an MSK clinic for what "*may be capsulitis*". There was no medication/treatment advised or prescribed.
- (o) There is no entry at all regarding any shoulder pain between August 2019 and February 2020, and there is no ongoing treatment in relation to it.
- (p) On 13 February 2020, the GP records "*generalised tenderness over neck and shoulder*" "*works doing heavy lifting, doesn't want to work there anymore but can't find another job*" "*has had shoulder pain for 2 weeks*" "*pain in right shoulder and neck*". The claimant was prescribed Fenbid 5% (ibuprofen gel) 30mg.
- (q) On 18 Feb 2020, the GP records "*uncomfortable feeling in the back*" "*some tingling and numbness in hands and fingers*" "*movements slightly restricted in arms and legs because of pain in right shoulder*" "*ongoing pain in lower back and on the right side of neck*" "*says [she is] in agony because of pain and it's not severe*" "*seen on 13th Feb for soft tissue injury*" "*feels a lot better now compared to last week*" "*needs time off work as she has a 2 years old*" and "*can't carry heavy stuff as her work has no amended duties*". The claimant is advised to continue with pain relief and gel; given a fit-note for 1 month due to the reported lack of amended duties, and referred for physiotherapy.
- (r) On 21 Feb 2020, the GP records "*ongoing shoulder and back pain*" and prescribes co-codamol for pain;
- (s) On 18 Mar 2020, the GP records "*lower back pain*" for a new sick note for 2 weeks;
- (t) On 29 May 2020, the GP records "*right shoulder pain last 2 months or*

- more* “has had similar pain in the past, pain now constant about 3 months” “pain is worse after heavy lifting and after house chores”. The Claimant was prescribed Naproxen for pain, and referred for an ultrasound of her right shoulder.
- (u) On 4-5 Aug 2020, the claimant attended a neurological examination at her GP Surgery which records “?MSK” “bad postural” “advised to attend physio, regular exercise, analgesic” “normal gait, walk to room unaided”;
 - (v) On 21 Aug 2020, the GP records “[complains of] anxiety/distress at work place” “wants sick note because has physiotherapy and shoulder pain” and “feels anxiety if goes back to work”. The claimant was issued with a sick note for “stress at work” for 2 weeks;
 - (w) 7 Sept 2020: Lab Results for “Ultrasound Left Shoulder” and “Ultrasound Right Shoulder” both record “A Normal Result – No Action Needed – Reassure Patient”.
 - (x) On 15 Sept 2020, the claimant attended her GP to receive the scan results, and records “no evidence of any tear. Says she still has pain, has been seen by physio, tried different analgesia, says nothing seems to be working, affecting her life, wants MRI, no need for MRI currently, needs to contact physio if they feel MRI is needed then can be done” “wants to try different pain relief”. The claimant was prescribed Tramadol for 10 days.
 - (y) On 30 Sept 2020, the GP records “says suffers from shoulder pain but no support at work, has applied for other jobs but no success” during a telephone consultation regarding her mental health;
 - (z) On 7 Oct 2020, the GP records “applying for other jobs, still has shoulder pain so will look for a job with less physical demand” during a consultation regarding her mental health. The claimant was issued a further sick note for 4 weeks for “shoulder pain stress at work anxiety”;
 - (aa) On 26 Oct 2020, the GP records “not able to lift heavy weights” “looking for other non-physical jobs”.
 - (bb) On 4 Nov 2020, the GP issued a fit note for 4 weeks “may be fit for work” “chronic left shoulder pain” “wants [fit note] with amended duties, not lifting weight”.
 - (cc) On 4 Dec 2020, the GP records “ongoing shoulder pain – awaiting physio”. The claimant was prescribed Co-codamol and Naproxen for 2 weeks for pain.

Anxiety

- (dd) On 10 June 2019, the GP records “Acute stress reaction NOS (First)”. It is noted that “stress at work causing tremors in hands” and “feels she is [being] treated badly” regarding the work restriction fit note provided the week before. There is no medication/treatment advised or prescribed.
- (ee) On 25 June 2019, the GP records “stress at work and wants a sick note” and “stress related symptoms”. There is no medication/treatment advised

- or prescribed.
- (ff) On 9 Aug 2019, the GP records "*stress related problem*" and "*she feels she is depressed when she [thinks] about going to work she gets palpitation; tingling in her fingers; sweating in her fingers; and she also [complains of] poor sleep*". There is no medication/treatment advised or Prescribed.
 - (gg) There is no entry at all regarding any mental health issue between August 2019 and June 2020, and there is no ongoing treatment in relation to it.
 - (hh) On 24 June 2020, the GP records "*feels stressed due to work place*" "*Probably thinking about resigning*" "*Poor sleep. Appetite OK. Feels tired. Not enjoying things as before*". The claimant was prescribed Sertraline 50mg for 3 weeks.
 - (ii) On 6 July 2020, the GP records "*Anxiety state (First)*" "*feels getting a lot of workload*" "*Gets panic attack with palpitation/sweating*" "*Feels employer not taking her mental health seriously. She feels her brain is getting damaged*" "*On Sertraline. Good compliance.*" "*Sleep upset. Appetite OK*" "*Speaking normally over the phone*". The claimant was issued with a sick note for "*stress and anxiety*" for 3 weeks.
 - (jj) On 28 July 2020, the GP records "*Anxiety states*" "*restart sertraline*" "*had panic attack at work 3 weeks ago*" "*has now decided to leave work place due to stress*" "*having on and off palpitations and chest pain, only when she started to think of going back to work*" "*no chest pain now*" "*thoughts of work make her anxious*" "*mood okay*" "*sertraline helped by run out*". The claimant was prescribed Sertraline 50mg for 4 weeks. She was issued with a sick note for "*stress related problem*" for 1 week.
 - (kk) On 21 August 2020, the GP records "*anxiety/distress at work place*" "*wants sick note because has physiotherapy and shoulder pain*" and "*feels anxiety if goes back to work*". The claimant was issued with a sick note for "*stress at work*" for 2 weeks. She was not prescribed further medication.
 - (ll) On 3 September 2020, the GP records "*doesn't feel ready to return to work*" and issues a further sick note for "*stress at work*" for 4 weeks. The claimant was not prescribed further medication.
 - (mm) On 30 September 2020, the GP records "*due to be back in work soon. Feeling more anxious, also lack of sleep, palpitations and sweating, had Chest pain, ECG normal, no thoughts of suicide or self-harm, says feels she will be mocked at work, will be given difficult tasks at work, says suffers from shoulder pain but no support at work, has applied for other jobs but no success, tried sertraline and zopiclone but not regular*". The claimant is recorded as having arranged counselling, and is prescribed Sertraline 50mg for 28 days.
 - (nn) On 7 October 2020, the GP records "*feels she can't go back to work if she keeps feeling like that*" "*feels [return to work meeting] didn't go well and had an anxiety attack*" "*workplace isn't understanding, feels they have*

humiliated her and not taking mental health seriously” “has had 1 week of [counselling] treatment, advised might take a bit longer for her to feel better”. The claimant was issued a further sick note for 4 weeks for “shoulder pain stress at work anxiety”.

- (oo) On 26 October 2020, the GP records “*would like to continue sertraline for now, will wait for counselling” “getting on well with sertraline, not 100%, still not ready to go back to her existing workplace due to fear and anxiety” “mood is okay”.*
- (pp) On 4 Nov 2020, the GP issues a new sick note for amended duties, not lifting weight. There is no indication of mental health issue being reported or recorded.
- (qq) On 4 Dec 2020, the GP records “*anxiety and depressive symptoms mainly work related. She has now resigned from that job. Wants to continue on Sertraline for the time being as she is finding it good, helping with her symptoms. No negative thoughts”.*

13 Anxiety and Mental Health issues are only ever referred to in the GP notes as being “work related”; and follows her complaints regarding her alleged inability to lift; it is inextricably related to her reaction to her work problems.

14 The following facts emerge from the OH report dated 11 September 2020:

- (a) The claimant was fit for work at that point, and required only “short-term / temporary adjustments” over a 4-week phased return.
- (b) The claimant reports “participating in routine activities of daily living although she is restricted with ironing and food shopping. There is no indication that this is anything other than what the claimant herself reported, and it is clearly not an assessment by the OH practitioner of her functional ability.
- (c) The claimant was “*fit to stand, walk, bend, lift and twist”*; and her shoulder pain was specifically in relation to “*heavy*” lifting, for which the recommendation was a manual handling risk assessment and control measures to “*mitigate*” any hazard. There is no indication that the level of the claimant’s pain, or the amount of “*heaviness*” causing difficulty was such that the role itself of a Warehouse operative was unsuitable.
- (d) The report is entirely positive and optimistic in relation to the claimant’s mental health, and it indicates nothing more than a workplace dispute which has naturally caused her stress.

15 The claimant had frequent absences from work due to ill health as detailed on the fit-notes referred to in Paragraph 12 above. However, there is no evidence from the claimant or from any other source that, during the periods that she was in work, she was unable to perform her duties satisfactorily.

16 On 27 November 2020, the claimant resigned from her employment with immediate effect.

17 The summary of the medical evidence is that at no stage has the claimant been diagnosed with any sort of underlying physical impairment, whether left or right shoulder, or her back; the height of it is the claimant's own description of pain and reduced movement when lifting heavy items, which to this day remains unexplained. There is no evidence whatsoever that there is some underlying impairment which links those three distinct areas.

The Law

18 **Equality Act 2010**

Section 6: Disability

- (1) A person (P) has a disability if—
- (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Schedule 1: Disability Supplementary Provision **Part 1: Determination of Disability**

2 *Long-term effects*

- (1) The effect of an impairment is long-term if—
- (a) it has lasted for at least 12 months,
 - (b) it is likely to last for at least 12 months, or
 - (c) it is likely to last for the rest of the life of the person affected.

4 *Substantial adverse effects*

Regulations may make provision for an effect of a prescribed description on the ability of a person to carry out normal day-to-day activities to be treated as being, or as not being, a substantial adverse effect.

5 *Effect of medical treatment*

- (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

- (a) measures are being taken to treat or correct it, and
- (b) but for that, it would be likely to have that effect.

(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.

19 **Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)**

Part 2: Guidance on matters to be taken into account in determining questions relating to the definition of disability

Section A: The Definition

Main elements of the definition of disability

A1. The Act defines a disabled person as a person with a disability. A person has a disability for the purposes of the Act if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities (s 6(1)).

A2. This means that, in general:

- the person must have an impairment that is either physical or mental (see paragraphs A3 to A8);
- the impairment must have adverse effects which are substantial (see Section B);
- the substantial adverse effects must be long-term (see Section C); and
- the long-term substantial adverse effects must be effects on normal day-to-day activities (see Section D).

This definition is subject to the provisions in Schedule 1.

All of the factors above must be considered when determining whether a person is disabled.

Meaning of 'impairment'

A3. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the

effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.

A4. Whether a person is disabled for the purposes of the Act is generally determined by reference to the effect that an impairment has on that person's ability to carry out normal day-to-day activities. An exception to this is a person with severe disfigurement (see paragraph B24). It is not possible to provide an exhaustive list of conditions that qualify as impairments for the purposes of the Act. Any attempt to do so would inevitably become out of date as medical knowledge advanced.

A5. A disability can arise from a wide range of impairments which can be:

- sensory impairments, such as those affecting sight or hearing;
- impairments with fluctuating or recurring effects such as rheumatoid arthritis, myalgic encephalitis (ME), chronic fatigue syndrome (CFS), fibromyalgia, depression and epilepsy;
- progressive, such as motor neurone disease, muscular dystrophy, and forms of dementia;
- auto-immune conditions such as systemic lupus erythematosus (SLE);
- organ specific, including respiratory conditions, such as asthma, and cardiovascular diseases, including thrombosis, stroke and heart disease;
- developmental, such as autistic spectrum disorders (ASD), dyslexia and dyspraxia;
- learning disabilities;
- mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post-traumatic stress disorder, and some self-harming behaviour;
- mental illnesses, such as depression and schizophrenia;
- produced by injury to the body, including to the brain.

A6. It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.

A7. It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. For example, liver disease as a result of alcohol dependency would count as an impairment, although an addiction to alcohol itself is expressly excluded from the scope of the

definition of disability in the Act. What it is important to consider is the effect of an impairment, not its cause – provided that it is not an excluded condition. (See also paragraph A12 (exclusions from the definition).)

'A woman is obese. Her obesity in itself is not an impairment, but it causes breathing and mobility difficulties which substantially adversely affect her ability to walk.'

A man has a borderline moderate learning disability which has an adverse impact on his short-term memory and his levels of literacy and numeracy. For example, he cannot write any original material, as opposed to slowly copying existing text, and he cannot write his address from memory.'

It is the effects of these impairments that need to be considered, rather than the underlying conditions themselves.'

A8. It is important to remember that not all impairments are readily identifiable. While some impairments, particularly visible ones, are easy to identify, there are many which are not so immediately obvious, for example some mental health conditions and learning disabilities.

Section B: Substantial

This section should not be read in isolation but must be considered together with sections A, C and D. Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the adverse effect of the person's impairment on the carrying out of normal day-to-day activities is substantial and long term.

Meaning of 'substantial adverse effect'

B1. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the Act at s 212(1). This section looks in more detail at what 'substantial' means. It should be read in conjunction with Section D which considers what is meant by 'normal day-to-day activities'.

Cumulative effects of an impairment

B4. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is

important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.

B5. For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.

'A man with depression experiences a range of symptoms that include a loss of energy and motivation that makes even the simplest of tasks or decisions seem quite difficult. He finds it difficult to get up in the morning, get washed and dressed, and prepare breakfast. He is forgetful and cannot plan ahead. As a result he has often run out of food before he thinks of going shopping again. Household tasks are frequently left undone, or take much longer to complete than normal. Together, the effects amount to the impairment having a substantial adverse effect on carrying out normal day-to-day activities.'

B6. A person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day-to-day activities. For example, a minor impairment which affects physical co-ordination and an irreversible but minor injury to a leg which affects mobility, when taken together, might have a substantial effect on the person's ability to carry out certain normal day-to-day activities. The cumulative effect of more than one impairment should also be taken into account when determining whether the effect is long-term, **see Section C.**

'A person has mild learning disability. This means that his assimilation of information is slightly slower than that of somebody without the impairment. He also has a mild speech impairment that slightly affects his ability to form certain words. Neither impairment on its own has a substantial adverse effect, but the effects of the impairments taken together have a substantial adverse effect on his ability to converse.'

Effects of treatment

B12. The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'. The

practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (**Sch 1, Para 5(1)**). The Act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (**Sch 1, Para 5(2)**). In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs. (**See also paragraphs B7 and B16.**)

B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.

B14. For example, if a person with a hearing impairment wears a hearing aid the question as to whether his or her impairment has a substantial adverse effect is to be decided by reference to what the hearing level would be without the hearing aid. Similarly, in the case of someone with diabetes which is being controlled by medication or diet should be decided by reference to what the effects of the condition would be if he or she were not taking that medication or following the required diet.

'A person with long-term depression is being treated by counselling. The effect of the treatment is to enable the person to undertake normal day-to-day activities, like shopping and going to work. If the effect of the treatment is disregarded, the person's impairment would have a substantial adverse effect on his ability to carry out normal day-to-day activities.'

B15. The Act states that this provision does not apply to sight impairments to the extent that they are capable of correction by spectacles or contact lenses. (Sch 1, Para 5(3)). In other words, the only effects on the ability to carry out normal day-to-day activities which are to be considered are those which remain when spectacles or contact lenses are used (or would remain if they were used). This does not include the use of devices to correct sight which are not spectacles or contact lenses.

B16 Account should be taken of where the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement. It is necessary to consider whether, as a consequence of the treatment, the impairment would cease to have a substantial adverse effect. For

example, a person who develops pneumonia may be admitted to hospital for treatment including a course of antibiotics. This cures the impairment and no substantial effects remain. **(See also paragraph C11, regarding medical or other treatment that permanently reduces or removes the effects of an impairment.)**

B17. However, if a person receives treatment which cures a condition that would otherwise meet the definition of a disability, the person would be protected by the Act as a person who had a disability in the past. **(See paragraph A16.)**

Section C: Long-term

This section should not be read in isolation but must be considered together with sections A, C and D. Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the adverse effect of the person's impairment on the carrying out of normal day-to-day activities is substantial and long term.

Meaning of 'long-term effects'

C1. The Act states that, for the purpose of deciding whether a person is disabled, a long-term effect of an impairment is one:

- which has lasted at least 12 months; or
- where the total period for which it lasts, from the time of the first onset, is likely to be at least 12 months; or
- which is likely to last for the rest of the life of the person affected **(Sch 1, Para 2)**.

Meaning of 'likely'

C3. The meaning of 'likely' is relevant when determining:

- whether an impairment has a long-term effect **(Sch 1, Para 2(1), see also paragraph C1)**;

In these contexts, 'likely', should be interpreted as meaning that it could well happen.

C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an

effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).

Section D: Normal day-to-day activities

This section should not be read in isolation but must be considered together with sections A, B and C. Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the adverse effect of the person's impairment on the carrying out of normal day-to-day activities is substantial and long term.

D1. The Act looks at a person's impairment and whether it substantially and adversely affects the person's ability to carry out normal day-to-day activities. Meaning of 'normal day-to-day activities'

D2. The Act does not define what is to be regarded as a 'normal day-to-day activity'. It is not possible to provide an exhaustive list of day-to-day activities, although guidance on this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

'A person works in a small retail store. His duties include maintaining stock in a stock room, dealing with customers and suppliers in person and by telephone, and closing the store at the end of the day. Each of these elements of the job would be regarded as a normal day-to-day activity, which could be adversely affected by an impairment.'

D4. The term 'normal day-to-day activities' is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether an activity is a normal day-to-day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning.

D5. A normal day-to-day activity is not necessarily one that is carried out by a majority of people. For example, it is possible that some activities might be carried out only, or more predominantly, by people of a particular gender, such as breast-feeding or applying make-up, and cannot therefore be said to be normal for most people. They would nevertheless be considered to be normal day-to-day activities.

D6. Also, whether an activity is a normal day-to-day activity should not be determined by whether it is more normal for it to be carried out at a particular time of day. For example, getting out of bed and getting dressed are activities that are normally associated with the morning. They may be carried out much later in the day by workers who work night shifts, but they would still be considered to be normal day-to-day activities.

D12. In the Appendix, examples are given of circumstances where it would be reasonable to regard the adverse effect on the ability to carry out a normal day-to-day activity as substantial. In addition, examples are given of circumstances where it would not be reasonable to regard the effect as substantial. In these examples, the effect described should be thought of as if it were the only effect of the impairment.

D13. The examples of what it would, and what it would not, be reasonable to regard as substantial adverse effects on normal day-to-day activities are indicators and not tests. They do not mean that if a person can do an activity listed then he or she does not experience any substantial adverse effects: the person may be affected in relation to other activities, and this instead may indicate a substantial effect. Alternatively, the person may be affected in a minor way in a number of different activities, and the cumulative effect could amount to a substantial adverse effect. (**See also paragraphs B4 to B6 (cumulative effects).**)

D14. The examples in this section describe the effect which would occur when the various factors described in Sections A, B and C have been allowed for, including for example disregarding the impact of medical or other treatment.

Appendix

An illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities.

Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the

substantial adverse effect of the impairment on normal day-to-day activities is long term.

In the following examples, the effect described should be thought of as if it were the only effect of the impairment.

- Difficulty in getting dressed, for example, because of physical restrictions, a lack of understanding of the concept, or low motivation;
- Difficulty carrying out activities associated with toileting, or caused by frequent minor incontinence;
- Difficulty preparing a meal, for example, because of restricted ability to do things like open cans or packages, or because of an inability to understand and follow a simple recipe;
- Difficulty eating; for example, because of an inability to co-ordinate the use of a knife and fork, a need for assistance, or the effect of an eating disorder;
- Difficulty going out of doors unaccompanied, for example, because the person has a phobia, a physical restriction, or a learning disability;
- Difficulty waiting or queuing, for example, because of a lack of understanding of the concept, or because of pain or fatigue when standing for prolonged periods;
- Difficulty using transport; for example, because of physical restrictions, pain or fatigue, a frequent need for a lavatory or as a result of a mental impairment or learning disability;
- Difficulty in going up or down steps, stairs or gradients; for example, because movements are painful, fatiguing or restricted in some way;
- A total inability to walk, or an ability to walk only a short distance without difficulty; for example because of physical restrictions, pain or fatigue;
- Difficulty entering or staying in environments that the person perceives as strange or frightening;
- Behaviour which challenges people around the person, making it difficult for the person to be accepted in public places;
- Persistent difficulty crossing a road safely, for example, because of physical restrictions or a failure to understand and manage the risk;
- Persistent general low motivation or loss of interest in everyday activities;
- Difficulty accessing and moving around buildings; for example because of inability to open doors, grip handrails on steps or gradients, or an inability to follow directions;
- Difficulty operating a computer, for example, because of physical restrictions in using a keyboard, a visual impairment or a learning disability;
- Difficulty picking up and carrying objects of moderate weight, such as a bag of shopping or a small piece of luggage, with one hand;

- Inability to converse, or give instructions orally, in the person's native spoken language;
- Difficulty understanding or following simple verbal instructions;
- Difficulty hearing and understanding another person speaking clearly over the voice telephone (where the telephone is not affected by bad reception);
- Persistent and significant difficulty in reading or understanding written material where this is in the person's native written language, for example because of a mental impairment, or learning disability, or a visual impairment (except where that is corrected by glasses or contact lenses);
- Intermittent loss of consciousness;
- Frequent confused behaviour, intrusive thoughts, feelings of being controlled, or delusions;
- Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder;
- Persistent difficulty in recognising, or remembering the names of, familiar people such as family or friends;
- Persistent distractibility or difficulty concentrating;
- Compulsive activities or behaviour, or difficulty in adapting after a reasonable period to minor changes in a routine.

An illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would not be reasonable to regard as having a substantial adverse effect on normal day-to-day activities.

Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the substantial adverse effect of the impairment on normal day-to-day activities is long term.

- Inability to move heavy objects without assistance or a mechanical aid, such as moving a large suitcase or heavy piece of furniture without a trolley;
- Experiencing some discomfort as a result of travelling, for example by car or plane, for a journey lasting more than two hours;
- Experiencing some tiredness or minor discomfort as a result of walking unaided for a distance of about 1.5 kilometres or one mile;
- Minor problems with writing or spelling;
- Inability to reach typing speeds standardised for secretarial work;
- Inability to read very small or indistinct print without the aid of a magnifying glass;
- Inability to fill in a long, detailed, technical document, which is in the person's native language, without assistance;

- Inability to speak in front of an audience simply as a result of nervousness;
- Some shyness and timidity;
- Inability to articulate certain sounds due to a lisp;
- Inability to be understood because of having a strong accent;
- Inability to converse orally in a language which is not the speaker's native spoken language;
- Inability to hold a conversation in a very noisy place, such as a factory floor, a pop concert, sporting event or alongside a busy main road;
- Inability to sing in tune;
- Inability to distinguish a known person across a substantial distance (e.g. across the width of a football pitch);
- Occasionally forgetting the name of a familiar person, such as a colleague;
- Inability to concentrate on a task requiring application over several hours;
- Occasional apprehension about significant heights;
- A person consciously taking a higher than normal risk on their own initiative, such as persistently crossing a road when the signals are adverse, or driving fast on highways for own pleasure;
- Simple inability to distinguish between red and green, which is not accompanied by any other effect such as blurring of vision;
- Infrequent minor incontinence;
- Inability to undertake activities requiring delicate hand movements, such as threading a small needle or picking up a pin.

20 **Decided Cases**

Kapadia –v- London Borough of Lambeth [2000] IRLR 699 (CA)

The burden of showing disability lies squarely on the claimant. Disability is an issue of fact to be determined by the tribunal on the balance of probability.

Woodrup -v- Southwark LBC [2003] IRLR 111 (CA)

The claimant is required to prove her alleged disability with some particularity.

McKechnie Plastic Components –v- Grant UKEAT/0284/08 (EAT) **J –v- DLA Piper UK LLP [2010] IRLR 936 (EAT)**

A claimant is not required to demonstrate a clinical psychiatric disorder in order to qualify for a finding that they suffer from an impairment.

There are indeed sometimes cases where identifying the nature of the impairment from which a claimant may be suffering involves difficult medical questions; and in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the

claimant's ability to carry out normal day-to-day activities has been adversely affected on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the claimant is suffering from a condition which has produced that adverse effect – in other words, an 'impairment'. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues.

Morgan Stanley International v Posavec [2014] All ER (D) 35 (EAT)

Where multiple conditions are relied upon it is incumbent on the tribunal to identify what symptoms are attributable to each alleged impairment, and apply the test accordingly –

Vicary –v- British Telecommunications Plc [1999] IRLR 680 (EAT)

Leonard –v- Southern Derbyshire Chamber of Commerce [2001] IRLR 19 (EAT)

Ahmed –v- Metroline Travel Limited [2011] EqLR 464 (EAT)

Aderemi –v- London and South East Railway UKEAT/0316/12 (EAT)

Substantial adverse effect, means an effect which is more than minor or trivial; it is a relatively low standard. The focus should be on what an employee *cannot* do, or can only do with difficulty; and not on what they *can* do easily. A tribunal should look at the whole picture; but it is not a question of balancing what an employee can do against what they cannot do. If the employee is substantially impaired in carrying out any normal day-to-day activities - then the employee is disabled notwithstanding their ability in a range of other activities. However, where there is a factual dispute as to what a claimant is asserting that he/she cannot do findings of fact as to what claimant actually can do may throw significant light on the disputed question of what he/she cannot do. The fact that an employee is able to mitigate the effects of an impairment does not prevent there being a disability.

Law Hospital NHS Trust –v- Rush [2001] IRLR 611 (CS)

Evidence of the nature of the claimant duties at work, and the way in which they are performed, particularly if they include "normal day-to-day activities", can be relevant to the assessment which the tribunal has to make of the claimant's case.

Cruickshank –v- VAW Motorcast Ltd [2002] IRLR 24 (EAT)

McDougall -v- Richmond Adult Community College [2008] ICR 431 (CA)

The appropriate tests must be applied to the claimant's condition at the date of the alleged discriminatory act.

Where an employee's symptoms, and the degree of impairment, are exacerbated by conditions at work, the tribunal should consider the employee's ability to carry out normal day-to-day activities within the working environment. The employee should not be deprived of protection merely because the degree of impairment suffered is substantially less when away from work.

Vicary –v- British Telecommunications Plc [1999] IRLR 680 (EAT)
McKechnie Plastic Components –v- Grant UKEAT/0284/08 (EAT)

It is not for a doctor to express an opinion as to what is a normal day-to-day activity; nor is it for the medical expert to tell the tribunal whether the impairment is gave rise to a *substantial adverse effect* - these are matters for the Employment Tribunal to decide on its own assessment of the totality of the available evidence; of which medical opinion is merely a part.

The Claimant's Case

21 Essentially, the claimant's case is that the weights which she was expected to lift and move whilst in the respondents employment were moderate. The fact that she was unable to lift them without experiencing pain is proof that she was unable to carry out a "normal day-to-day activity". She clearly had "an impairment" which prevented her from doing this; and, as that situation pertained for almost two years she clearly meets the statutory definition of disability. Mr Pettifer, relying principally on the case of **J -v- DLA Piper**, urges us that the absence of any particular diagnosis accounting for the claimant's difficulties is irrelevant.

The Respondent's Case

22 To an extent, in my judgement, Mr Pettifer has misunderstood one of the principal submissions made on behalf of the respondent which relates to the absence of an overarching diagnosis of an underlying condition to account for the claimant's physical symptoms. Mr Proffitt did not argue that the absence of a specific diagnosis of itself undermined the claimant's claim to have been a disabled person - what was argued on behalf of the respondent is that the claimant appears to have had a series of unconnected physical impairments each of which led to symptoms of short-term duration: -

- (a) **Caesarean Scar Pain**: First reported in March 2019; Ultrasound Scan is normal in May 2019; no reference to this condition affecting the claimant after December 2019.
- (b) **Left Shoulder Pain**: First reference is in May 2019; normal Ultrasound in August 2019 - no further reference for over 12 months until September 2020.

- (c) Right Shoulder Pain: First reference in February 2020; normal Ultrasound in September 2020 - no further reference to any difficulties.
- (d) Back Pain: First reference in February 2020; no reference after March 2020.

23 So far as Mental Health impairments are concerned, there are two references to anxiety the GP notes in June 2019 and a further reference in August 2019 - but on none of these occasions any medication or treatment provided or recommended. The notes are then silent on the question of mental health problems until 24 June 2020 when for the first time the claimant was prescribed Sertraline. Mental Health problems then persist until the claimant's resignation in November 2020 - a period of just five months. Throughout this period, the problems experienced are entirely expressed to be "work related". Accordingly, Mr Proffitt submits that the reasonable expectation of the claimant and her GP would be that such problems would easily resolve following the claimant's return to work or her resignation - well within a period of 12 months from her first requiring any medical intervention.

24 Perhaps of greater significance to the respondent, is the submission that on the basis of the medical evidence the claimant did not for any significant period suffer a substantial adverse impact on her ability to carry out normal day-to-day activities. The claimant's GP never found any clinical explanation for the claimant's apparent inability to lift weights required of her at work. Moreover, when examined in clinic the GP never reports a patient as frail as the claimant describes in her impact statement. Furthermore, not only is there no clinical assessment of such extreme debility, in the claimant's repeated history as given to the GP in consultation, she does not describe problems anywhere so severe as those she describes in her impact statement. Mr Proffitt submits that the impact statement is a series of assertions which are not remotely supported by the medical evidence and which simply should not be accepted.

Discussion

25 My judgement is that there is considerable merit in the respondent's case regarding whether we have a physical impairment here having a sufficiently debilitating effect on a long-term basis, or a series of unconnected physical impairments each having such an effect for a much shorter period. By way of illustration, if a man suffers a broken ankle playing football; is severely debilitated as a result; but makes a full recovery within six months - then clearly, he would not meet the definition of a disabled person. In my judgement, he would not then become a disabled person if he had the misfortune, at the point of full recovery, to suffer a fracture of his other ankle - with a similar debilitating effect; again with a full recovery after six months. The position would be different if he suffered from Rheumatoid Arthritis or a similar condition - capable of affecting various

joints in series. But that is not this case: the claimant's GP has found nothing (despite extensive medical investigations) to account for the symptoms of which she complains; and more importantly, nothing to connect the physical symptoms around the Caesarean scar; the left shoulder; the right shoulder; and the back. Assuming some debilitating effect over the period of the claimant's employment, the medical evidence does not support the proposition that this was caused by a physical impairment - but rather a series of unrelated physical impairments; none of which had any adverse effect for more than 12 months. Accordingly, on this basis alone, I conclude that, by reference to her physical conditions, the claimant has not established that, at any material time, she was a disabled person.

26 Similarly with regard to the claimant's Mental Health conditions, it is clear from the GP notes that the onset of substantial Mental Health impairment arose in June 2020. Throughout the period from then until the claimant's resignation in November all of her Mental Health problems were described as being "work related". There could have been no expectation for such problems to continue beyond the period of the claimant's absence from work or the end of her employment November 2020. And so, in my judgement, again on the basis of *long term* the claimant has not established disability.

27 Much more important however that the questions of *long term*, in my judgement, is the question of the *substantial* adverse effect on *normal day-to-day activities*. Throughout the period for which we have medical records available, the GP never identifies the claimant as an individual who is experiencing difficulty in carrying out normal day-to-day activities; and certainly not one as debilitated as the claimant describes. Not only does the GP may make no relevant clinical finding as to such debility, the simple fact is that when attending her GP the claimant never reports herself as suffering adverse impacts anywhere remotely as substantial as those described in her impact statement. Because the inconsistencies between what the claimant states in her impact statement and that which she reported to her GP contemporaneously; and the inconsistency between the impact statement and the GP's clinical findings, I do not accept the accuracy of the impact statement. My finding is that the claimant has embellished the effects of her various conditions for the purposes of this claim.

28 I therefore find that, not only did the claimant not suffer any debilitating condition *long-term*, I also find that she did not as a result of any such condition suffer a *substantial* adverse impact on her ability to undertake *normal day-to-day activities*. Accordingly she does not meet the test for disability.

29 I have had no specific evidence as to the weight of the items which the claimant was required to lift during the course of her employment. She describes these as *moderate* and in doing so attempts to bring herself within the first part of the Appendix to the 2011 Guidance (bullet point 16); however, the only reference

in the medical records to lifting of weights is a suggested temporary prohibition on the lifting of *heavy* weights - which would engage the second part of the Appendix (bullet point 1).

Conclusion

30 Accordingly, and for the reasons given, I find that, at no time material to this claim, was the claimant a disabled person as defined in the Equality Act 2010. The claims for disability discrimination are accordingly dismissed.

**Signed by: Employment Judge Gaskell
Signed on: 2 August 2021**